



HUMAN RIGHTS PROGRAM

October 24, 2015

John H. Knox
UN Special Rapporteur on Human Rights and the Environment
Henry C. Lauerman Professor of International Law
Wake Forest University School of Law

Dear Rapporteur Knox:

I am writing to submit an analysis that might be helpful in the preparation of your March report to the Human Rights Council. Said analysis is contained in an *amicus* brief that the **Human Rights Program** and the **Environment Program** of **Universidad Iberoamericana (Mexico City)** submitted to the Mexican Supreme Court of Justice regarding Mayan communities' complaint against the government's authorization to release genetically modified soy to the environment; the latter to the detriment of the Mayan peoples' environment and use of natural resources to produce organic honey and in violation of the indigenous peoples' right to be consulted.

The *amicus* brief (available in Spanish and English) is titled "***The Human Right to a Safe and Healthy Environment: Content and scope of obligations derived from this right in light of International Human Rights Law and International Environmental Law***" and elaborates on the human right to a safe and healthy environment, namely, (1) the concept of environment; (2) its relationship to other human rights; (3) the legal grounds of the human right to a safe and healthy environment; (4) its normative content; (5) the scope of obligations derived from this right; and (6) the adoption of precautionary and preventive measures for compliance of these obligations. Particularly relevant for you may be sections VII, VIII and IX, which try to interpret the rights' content from a holistic approach that considers not only international human rights law but also environmental law.

Sincerely,

Denise GONZÁLEZ-NÚÑEZ, M.St.
Coordinator
Human Rights Program
Universidad Iberoamericana, Ciudad de México
Tel. (55) 5950-4000 Ext. 7658
denise.gonzalez@ibero.mx



AMICUS CURIAE

The Human Right to a Safe and Healthy Environment: Content and scope of obligations derived from this right in light of International Human Rights Law and International Environmental Law

I. OBJECTIVE OF THIS DOCUMENT

This *Amicus Curiae* provides the Supreme Court of Justice the analysis to better solve the Writs of Amparo under review 498/2015, 499/2015, 500/2015, 241/2015, 270/2015, 410/2015 and 198/2015, related to seek the protection of the Federal Court of Mayan peoples against the government's authorization, in favor of a third party, to release genetically modified soy to the environment, affecting the habitat and natural resources of the Mayan communities in Campeche – specially honey production – and to use hazardous chemicals; additional to potential effects to human beings due to the use of genetically modified food.

Therefore, herein we will discuss the human right to a safe and healthy environment: (1) The concept of environment; (2) its relationship to other human rights; (3) the legal grounds of the human right to a safe and healthy environment; (4) its normative content; (5) the scope of obligations from this right; and (6) the adoption of precautionary and preventive measures for compliance of these obligations.

This document recaptures the analysis structure of the Committee on Economic, Social and Cultural Rights (CESCR) of United Nations when stating its General Observations.

II. INTEREST IN THE *AMICUS CURIAE*

The Human Rights Program of Universidad Iberoamericana, Mexico City established in 1998 to create and consolidate a human rights culture across the social and political sectors in Mexico, through social research, advocacy, promotion, education and debate.

Additionally, the objective of the Environment Program of the University is to promote processes to include a sustainability approach in the different operations of the University, as well as to boost processes, create alternatives and offer elements to solve socio-environmental problems from a sustainable perspective.

In a response to this socio-environmental crisis, this Environment Program promotes the incorporation of sustainability within the University and on its social projects.

On one hand, this *Amicus* is based on the need to contribute to the current international discussion on the human right to a safe and healthy environment¹, particularly on the legal basis, content and scope. On the other hand, it is based on the need to reinforce human rights of indigenous peoples, especially regarding their environment, which is part of their protected rights.

¹ As mentioned afterwards, in 2015 the *Special Rapporteur on obligations of human rights related to a safe, clean, healthy and sustainable environment* to analyze and offer clearance on obligations for protection and guarantee a safe and healthy environment was designated.

III. INTRODUCTION

The environment is not a replaceable resource; it is the “common ground”² that humanity depends on. Its protection and care is vital to assure a quality life for society and to continue life on Earth. This is not achieved only by preventing and turning back processes and activities that clearly generate degradation, but implementing extreme measures against activities – with no scientific proof – that will adversely impact the environment and human life.

Opposed to this, human activity shows a severe predation and destruction, aggravated by “rapid” human actions compared to the “slow biological evolution of nature”.³ The erroneous concept of environment as a set of endless resources capable of rapidly recovering and our relationship to it as human beings, prevents the idea of *sustainability*. Then, environment must be fundamental as a social good and not only as an economic mean.⁴

That is how the human right to a safe and healthy environment must be interpreted. The interpretation of the human right to a safe and healthy environment comes from an anthropocentric point of view, which seeks to protect human dignity and to guard life as a whole. To guarantee the human right to a safe and healthy environment favors conservation of ecosystems, natural resources and ecological balance, and also conditions to an adequate life for current generations, and even the preservation of human life and potential fulfillment of needs for future generations.

IV. THE CONCEPT OF ENVIRONMENT

Environment is considered as the dialectic relationship between social and natural systems. That is, the transforming action of society influences nature, and conditions social processes. Herein, environment is the term used to refer to the natural system, including biological, physical and chemical elements influencing life of human beings.⁵

² Encyclical Chart “Laudato Si”, on care of the common ground, of Pope Francis (2015). Mexico: Vatican Bookstore Editrice.

³ Ibid. p. 17.

⁴ As declared by the Committee on Economic, Social and Cultural Rights (CESCR) regarding the water right, we also defend the posture on environment. CESCR. General Observation No. 14. The potential grant of the highest level of health (article 12 of the International Covenant on Economic, Social and Cultural Rights), (22^o session, 2000), U.N. Doc. E/C.12/2000/4 (2000), par. 11.

⁵ Prüss-Üstün, Annette (2006). *Preventing disease through healthy environments*. Switzerland: World Health Organization, p. 21. Available at: http://www.who.int/quantifying_ehimpacts/publications/preventingdisease.pdf?ua=1 y http://www.who.int/quantifying_ehimpacts/publications/previdisexecsumsp.pdf (executive summary in Spanish); also consult César Sepúlveda. Derecho a un medio ambiente sano [*Right to a Safe and Healthy Environment*]. *Boletín Mexicano de Derecho Comparado* No. 82. Available at: <http://juridicas.unam.mx/publica/rev/boletin/cont/82/art/art9.htm>

According to the Supreme Court of Justice, environment is the “set of natural and artificial elements, or influenced by men, that make life and development possible for human beings and other live organisms living in a specific time and area – with no possible pollution – to assure ecological balance”.

Based on this, we may declare that environment must include physical and biological processes, such as flora, fauna, earth, water, air and other natural elements that form an ecologically balanced system.⁶

V. A SAFE AND HEALTHY ENVIRONMENT IS CLOSELY RELATED TO HUMAN RIGHTS

A safe and healthy environment, recognized as a principle in International Law, is previously required for protecting human rights.⁷ To guarantee this right reflects on people's well being, health, physical and psychological integrity and life, as individuals and as a society; that is, in the familiar and community level. Otherwise, there would be negative effects, even dramatic consequences for the well being of people, families and communities. According to the World Health Organization, “if environment were safer and healthier, more than 13 million of deaths would be prevented each year”.⁸

The International Community of Nations and international organizations have issued declarations several times. For example, the Stockholm Declaration on the Human Environment, was adopted in 1972 by the United Nations Conference on Human Environment, is a milestone in the environmental *corpus juris*. It proclaims that environment is essential “for the well being of men and to guarantee fundamental human rights, even the right of life itself”.⁹

En 1990, the General Assembly of United Nations adopted the 45/94 Resolution, where it “recognizes everyone is entitled to live in a safe and healthy environment, adequate for his/her own health and well being”. In the same year, the Human Rights Commission

⁶ Thesis: *SEGURO SOCIAL [SOCIAL SECURITY]*. ARTICLE 58, SECTION III, THIRD PARRAGRAPH, OF ADOPTED LAW, DOES NOT VIOLATE THE HUMAN RIGHT TO A SAFE AND HEALTHY ENVIRONMENT AS DECLARED IN ARTICLE 4o., FIFTH PARRAGRAPH, OF THE CONSTITUTION. 2000164. 2a. IX/2011 (10a.). Segunda Sala. Décima Época. *Weekly Federal Court Report and its Gazette*. Book IV, January 2012, p. 3816.

⁷ Bridget Lewis. “Environmental rights or a right the to environment? Exploring the nexus between human rights and environmental protection”. *MqJICEL* (2012) Vol 8(1):36-47, p. 1.

⁸ The World Health Organization has several data and figures to show how environmental factors affect human health. See “10 datos sobre medio ambiente y prevención de enfermedades” [10 data on environment and disease prevention]. Available at: http://www.who.int/features/factfiles/environmental_health/es/. Also see Prüss-Urstün, op. cit. *supra* note 5.

⁹ Declaration of United Nations Conference on the Human Environment. Declaration of Stockholm. U.N. Doc. A/Conf.48/14/Rev. 1(1973); 11 ILM 1416 (1972).

adopted the 1990/41 Resolution, highlighting the relation between human rights and environment.

In his own opinion on the Gabčíkovo-Nagymaros (1997) case, Judge Christopher G. Weeramantry – former Vice President of the International Court of Justice – declared that “environment protection is fundamental for the contemporary doctrine of human rights, since it is essential for several human rights, such as the health right, and even to the life right. It is not necessary to discuss this thoroughly, since affectation to environment may harm and deteriorate all human rights included in the Universal Declaration of Human Rights and other instruments of human rights”.¹⁰

Recently, in the analytical study on the relation between human rights and environment (2011), the High Commissioner for Human Rights declared how development of international law on Human Rights shows the wide recognition of this relation¹¹; particularly on how “environment function is vital for protecting and promoting human rights” (A/HRC/19/34, par. 23). After this consideration, the High Commissioner compels that “the need to protect and promote a safe and healthy environment is essential not only for human rights but for protecting a common patrimony of human kind” (A/HRC/19/34, par. 24).

Then, it is easy to understand the spirit and motivation in 1999 of our Federal Congress make a constitutional amendment — article 4 — to include the right of a safe and healthy environment. According to the reasons for this amend, “the right to a safe and healthy environment – to assure the dignity of people – is a right representing an ideal and a series of objectives for mankind to reach, no matter the risks to the environment”.¹²

Including the right to a safe and healthy environment in the Federal Constitution, Government implicitly recognized the relevance and impact of environment in human rights. Additionally, it moved forward to recognizing a safe and healthy environment as an

¹⁰ Judge Christopher G. Weeramantry, Separate opinion, Case of Gabčíkovo-Nagymaros (*Hungría vs. Eslovaquia*). International Court of Justice (September 25, 1997), ICJ Reports 1997, 111 n.78.

¹¹ For example, Convention on the Rights of the Child (article 24, par. 2c)); African Charter on Human and Peoples’ Rights (article 24) and Additional Protocol to American Convention of Human Rights on Economic, Social and Cultural Rights “Protocol of San Salvador” (article. 11); Convention on information access, public participation in decision making and access to justice on environmental topics 1998 (Convention of Aarhus).

¹² POPULAR CLAIM ON ENVIRONMENT. THE ARTICLE 124 OF THE SUSTAINABLE FORESTAL DEVELOPMENT ACT OF NUEVO LEÓN, STATING THAT ANY ACTION, OR OMISSION, VIOLATING DISPOSITIONS; AND OTHERS REGULATING MATTERS RELATED TO ECOSYSTEMS, ITS RESOURCES, GOODS OR ENVIRONMENTAL SERVICES, MAY BE ACCUSED BEFORE THE LOCAL AGROPECUARY AUTHORITY, VIA THE FOREST DIRECTION. ALSO DECLARING THAT CLAIMS SUBMITTED BY THIS ENTITY, UNDER COMMON LAW AND OTHER APPLICABLE REGULATIONS, SHALL BE SENT TO THE LAND-REFORM PROTECTION AGENCY FOR THE APPLICABLE PROCESS, DO NOT VIOLATE LEGAL CERTAINTY UNDER THE CONSTITUTIONAL ARTICLES 14 AND 16. Reasons approved with 10 votes. The Minister Arturo Zaldívar Lelo de Larrea was not present). Record No. 23928; Décima Época; Pleno; *Weekly Federal Court Report and its Gazette* Book XIII, October 2012, Book 1, pag. 477. Available

at: <http://sif.scjn.gob.mx/SJFSist/paginas/DetalleGeneralScroll.aspx?id=23928&Clase=DetalleTesisEjecutorias>

autonomous human right. Hence, the Federal Congress followed the global trend of constitutional recognition of this right and the development of a common law regarding this topic¹³.

For years “regional courts of human rights have dedicated a vast court precedent to the relation of human rights and environment”.¹⁴

VI. LEGAL FOUNDATION OF THE HUMAN RIGHT TO A SAFE AND HEALTHY ENVIRONMENT

The Federal Constitution — article 4, paragraph 5 — establishes the right for everybody to a safe and healthy environment for his/her development and well being. This constitutional concept adds that “the Government will guarantee this right”. As well as our Magna Carta, the Act of Ecological Balance and Environment Protection — article 1 — establishes its objective as to “promote sustainable development and establish foundations to (1) guarantee everyone to live in a safe and healthy environment for their development, health and well being.”

The Additional Protocol — article 11 — of the American Convention on Human Rights of Economic, Social and Cultural Human Rights “Protocol of San Salvador” — which Mexico is a member of since 1996 and must be guaranteed according to the constitutional article 1 — points out that “every person has the right to live in a safe and healthy environment...” (11.1) and that “participant Governments shall promote protection, conservation and improvement of the environment” (11.2).

The International Covenant on Economic, Social and Cultural Rights — Article 12.2 b) — recognizes the right of everyone to have the highest possible level of physical and mental health, and as a fundamental the “improvement of environment in all aspects [...]”.

¹³ In 1994 “more than 60 countries had approved constitutional dispositions on environment protection”, which in 2010 increased to 140. See OHCHR. *Analytical study on relation between human rights and environment* (2011), U.N. Doc. A/HRC/19/34, par. 30).

¹⁴ National Committee for Human Rights. *Third party expert Report on obligations of human rights on safe, clean, healthy and sustainable environment*. John H. Knox. U. N. Doc. A/ HRC/22/43 (December 24, 2012). Also see. African Commission on Human and Peoples' Rights, notice Nº 155/96, *Social and Economic Rights Action Center vs. Nigeria (Ogoniland Case)*, decision, par. 67; European Court on Human Rights, Öneriyildiz vs. Turkey (claim Nº 48939/99), judgement, November 30, 2004, par. 118; Inter-American Commission on Human Rights, Report on human rights situation in Ecuador, document OEA/Ser. L/V/II.96 doc. 10 rev. 1; European Committee on Social Rights, claim Nº 30/2005, Marangopoulos Foundation for Human Rights vs. Greece, par. 221; Inter-American Court on Human Rights, case of Pueblo Saramaka vs. Suriname, series C, Nº 172, judgement of November 28, 2007, par. 95, 158; case Yakye Axa Indigenous Community vs. Paraguay, series C, Nº 125, judgement June 17, 2005, par. 143, 156; Inter-American Commission on Human Rights, Mayas Indigenous Communities of Toledo District vs. Belize, case 12.053, report Nº 40/04, document OEA/Ser.L/V/II.122, doc. 5 rev. 1, par. 153; European Court on Human Rights, Fadeyeva vs. Russia (claim Nº 55723/00), judgement of June 9, 2005, par. 134; Taşkın and others vs. Turkey (claim Nº 46117/99), judgement of November 10, 2004, par. 126; López Ostra vs. Spain (claim Nº 16798/90), judgement of December 9, 1994, par. 58.

According to the Committee on Economic, Social and Cultural Rights — under their 14 General Observation (2000) — guaranteeing safe and healthy conditions is one of the essential factors for exercising article 12 of the Covenant.¹⁵ According to this, "the Committee interprets health right [...] as an inclusive right that not only comprises timely and adequate health attention but essential factors for health, such as [...] healthy occupational conditions and environment" (own emphasis).¹⁶

The Stockholm Declaration — principle 1 — stands out the following:

Relations established by the Stockholm Declaration among environment, development, adequate conditions of life, dignity, well being and human rights, including the right to live, involve recognition of the right to a safe and healthy environment, related standards and fundamental principles of universal human rights, individual and collective. Hence, these must be demanded by the individual, society, organizations, associations or other civil entities, such as peoples.¹⁷

Specifically, for indigenous peoples, the International Labour Organization — Article 4 of the 169 Covenant — establishes that "special measures shall be adopted to protect people, institutions, property, work, culture and environment of related peoples" (own emphasis). According to this concept, these measures "shall not be contrary to rights freely expressed by the interested peoples".¹⁸

Therefore, we emphasize that for the case of the *Yakye Axa Indigenous Community (2005)* the Inter-American Court of Human Rights established:

"Governments shall consider that rights of indigenous territories involve a wider and different concept, related to the collective right of survival as organized peoples, with control of their habitat as a required condition for reproduction of their culture, development and life. Property of land guarantees that members of indigenous communities preserve their cultural patrimony" (own emphasis).¹⁹

In this case, as well as in the case of the *Sawhoyamaya Indigenous Community*, the Inter-American Court of Human Rights declared that natural resources within the territory of

¹⁵ CESCR. General Observation 14, op. cit *supra* nota 4, par. 11.

¹⁶ Ibid.

¹⁷ Committee of Human Rights. *Final report of the Special Rapporteur, Mrs. Fatma Zohra Ksentini, on human rights and environment*. U. N. Doc. E/CN. 4/Sub.2/1994/9 (July 6, 1994), par. 31.

¹⁸ World Labour Organization (WLO), Covenant on indigenous and tribal peoples, Covenant 169 (June 27, 1989).

¹⁹ Inter-American Court on Human Rights, case of the *Yakye Axa Indigenous Community* (Fund, Remedies and Costs) Series C No 125 (June 17, 2005), par. 146.

these peoples and tribes — protected under Article 21 of the American Covenant on Human Rights — are those traditionally used and necessary for their survival, development and continuity of life.²⁰

It is interesting to observe how in the hermeneutic exercise of the Inter-American Court of Human Rights, protection of indigenous people expands to habitat — according to Article 4 of the 169 Covenant — including traditionally used natural resources. Not with a superficial desire but to include their interpretation of the world and cultural identity, indigenous peoples keep an interdependency relation for survival.

VII. NORMATIVE CONTENT OF THE RIGHT TO A SAFE AND HEALTHY ENVIRONMENT

Developing the normative content of the human right to a safe and healthy environment, in accordance with Constitutional article 1, involves a hermeneutic exercise that should provide the widest protection based on the interdependency between rights.

To facilitate this interpretation we will consult international sources, taking in consideration principles and standards of International Human Rights Law, as well as those related to the International Environmental Law. In an effort to achieve a collaborative, integral and coherent interpretation of International Law, reporting and supporting their development and transmission to the legal exercise in our country.

Currently, content of international law on human rights to a safe and healthy environment is under development. In fact, in March 2015 the United Nations Human Rights Council designated Mr. John Knox as *Special Rapporteur on obligations of human rights related to a safe, clean, healthy and sustainable environment* to analyze and offer clearance on obligations for protection and guarantee a safe and healthy environment.²¹ Therefore, the Supreme Court of Justice of Justice will be contributing and collaborating to this important discussion, through the analysis and application of the constitutional article 4 paragraph 5, and international treaties on the Writs of Amparos under review herein. The main objective of this document is to provide the Supreme Court of Justice elements to offer better solutions based on principles, standards and decisions on how this right must be interpreted.

The human right to a safe and healthy environment involves two axes: substantive and adjective.²² Substantively, the right herein bases the right to live under adequate

²⁰ Ibid., par. 124 y 137; Inter-American Court on Human Rights. Case of the *Sawhoyamaya Indigenous Community* (Fund, Remedies and Costs) Series C No 146 (March 29, 2006), pars. 118 and 121.

²¹ National Committee for Human Rights. U.N. Doc. A/HRC/28/L. 19. (March 24, 2015). Available at: <http://spinternet.ohchr.org/Layouts/SpecialProceduresInternet/ViewAllCountryMandates.aspx?Type=TM>

²² To elaborate the content herein the "Principle Project on Human Rights and Environment" is very useful, elaborated by the Special Rapporteur Mrs. Fatma Zohra Ksentini, included in her final report (E/CN.4/Sub.2/1994/9), *supra* nota 17. (ANNEX).

conditions for well being and a good quality life. As suggested by the Special Rapporteur, the right to a safe and healthy environment involves, at least, four factors:

- *No risks.* Identify, prevent and reduce health risks caused by human activities, such as extraction and raw materials processing, scientific and technology development, agricultural activities, unplanned urban development, and climate change effects.²³ Some examples are lack sanitation and water availability;²⁴ lead presence;²⁵ and use of hazardous fertilizers.²⁶ For this, it is relevant to observe that “major agriculture activities and intensive use of toxic pesticides represent a significant health risk”.²⁷
- *Clean.* Establish process to prevent and control water, soil and environmental pollution, and damages to biodiversity due to biological, physical, chemical, and radioactive factors, and others derived from human activity. As well as to guarantee corrective actions when needed.²⁸
- *Healthy.* Guarantee access to basic resources (air, water, green areas, etc) with quality necessary to allow peoples and communities to have an adequate life and good mental and physical conditions. Including adoption of actions to guarantee a “healthy soil” and prevent potential health risks.²⁹
- *Sustainable.* A human right to a safe and healthy environment, as described herein, shall be granted to current and future generations.³⁰

²³ Annalee Yassi and Tord Kjellström (2012). “Conexiones entre la salud ambiental y la salud en el trabajo” [*Relation between environment health and occupational health*]. *Riesgos ambientales para la salud en Enciclopedia de salud y seguridad en el trabajo.*, World Labour Organization, p. 53.3. Available at: <http://www.insht.es/InshtWeb/Contenidos/Documentacion/TextosOnline/EnciclopediaOIT/tomo2/53.pdf>

²⁴ Ibid

²⁵ Other examples available at Prüss-Urstün, op. cit. *supra* nota 5, p.27.

²⁶ Annalee Yassi and Tord Kjellström, op. cit. *supra* nota 23, p. 53.2.

²⁷ Ibid.

²⁸ Environment must be free of microorganism and hazardous substances, “such as radiation and hazardous chemical substances or other environmental factors affecting, directly or indirectly, health of humans”. CESCR, op. cit. *supra* nota 4, par. 15. Also see World Health Organization, *Guías para la calidad del agua potable [Guidelines for Quality of Tap Water]*, second edition, vols. 1 to 3 (Ginebra, 1993).

²⁹ 2015 is the International Year of Soil, established by United Nations, to promote sustainable use of soil and adoption of measures against soil degradation. See UN News Centre. Spotlighting humanity’s “silent ally”, UN launches 2015 International Year of Soils (December 5, 2014), available at: <http://www.un.org/apps/news/story.asp?NewsID=49520#.VcQExpIzIPa>. In Karl Heinz et al vs. Freistaat Bayern, the German Supreme Court of Justice declared that honey produced with pollen from genetically modified corn was subject to special label regulations due to “potential risk to human health”. Judgement (Supreme Court) of September 6, 2011, case C-442/09. Available at: <http://curia.europa.eu/juris/document/document.jsf?sessionid=9ea7d0f130d5fc276e09980442569f72e5ed84eae304.e34KaxiLc3eQc40LaxqMbN4ObNaPe0?text=&docid=109143&pageIndex=0&doclang=ES&mode=lst&dir=&occ=first&part=1&cid=133915>.

³⁰ CESCR. General Observation No. 15 Water Right (articles 11 and 12 of the Covenant), (29 assembly 2002) U.N. Doc. HRI/GEN/1/Rev.7 at 117 (2002), par. 11. Also see Committee on Human Rights. Report of the

Adjectively, the human right to a safe and healthy environment adheres to the right to environmental data; the right to participating in public matters and decision making affecting environment, the right to repair environmental damages.³¹ Rights recognized by different international and national organizations.

Particularly, for indigenous people, Covenant 169 recognizes the right to be consulted and participate in legal and administrative decision making, which affect them (article 6). Therefore, we make reference to the Inter-American jurisdiction, vast and clear in consultation and participation standards for indigenous peoples against potential affectations.³²

Regarding internal law it is relevant to mention the thesis on COMMUNITIES AND INDIGENOUS PEOPLES. ALL APPLICABLE AUTHORITIES, UNDER THEIR LEGAL POWER, ARE OBLIGED TO CONSULT THESE PEOPLES BEFORE ADOPTING ANY ACTION OR MEASURE THAT MAY AFFECT THEIR RIGHTS AND INTERESTS, issued by the first panel of judges. Thesis shown below:

Effective protection of fundamental rights of indigenous peoples and communities requires guaranteeing certain human rights, regarding procedure, mainly the access to information, participation in decision making and access to justice. Then, all applicable authorities are obliged to consult them before adopting any action or measure that may affect their rights and interests, which must comply the following: a) It must be anticipated; b) culturally adequate through representatives and traditional authorities; c) informed; and, d) of good faith. Based that Government consultation must not depend on a real affectation of rights but on the possibility of this affectation,

Special Rapporteur on the human right of sanitation and potable water, Catarina, Albuquerque. U.N. Doc. A/HRC/24/44 (July 11, 2013), par. 11. *Also see* Article 2.1, clause a), section iii, of Kyoto Protocol: "To promote sustainable development, each Party ... shall apply and continue elaborating policies and measures in compliance with national need, such as ...iii) promotion of sustainable agricultural processes based on climate change considerations". Kyoto Protocol to United Nations Convention on Environment. U.N. Doc. FCCC/CP/1997/7/Add.1, Dec. 10, 1997; 37 ILM 22 (1998).

³¹ Alexandre Kiss and Dinah Shelton. 2000. *International Environmental Law* (second edition). Transnational Publishers, Inc. United States.

³² Inter-American Court on Human Rights. Case of the *Mayagna (Sumo) Awas Tingni Indigenous Community* (Fund, Remedies and Costs) Series C No 79 (August 31, 2001); Inter-American Court on Human Rights. Case of the *Yakye Axa Indigenous Community* (Fund, Remedies and Costs) Series C No 125 (June 17, 2005), Inter-American Court on Human Rights. Case of the *Sawhoyamaya Indigenous Community* (Fund, Remedies and Costs) Series C No 146 (March 29, 2006), Inter-American Court on Human Rights. Case of the *Saramaka Indigenous Community* (Fund, Remedies and Costs) Series C No 172 (November 28, 2007), Inter-American Court on Human Rights. Case of the *Xákmok Kásek Indigenous Community* (Fund, Remedies and Costs) Series C No 214 (August 24, 2010), Inter-American Court on Human Rights. Case of the *Kichwa de Sarayaku Indigenous Community* (Fund, Repairs and Costs) Series C No 245 (June 27, 2012).

one of the objectives of the procedure is to determine if interests of indigenous peoples would be affected.³³

VIII. OBLIGATIONS DERIVED FROM THE HUMAN RIGHT TO A SAFE AND HEALTHY ENVIRONMENT

Though economic, social, cultural and environmental rights are progressive and depend on availability of resources, according to the Protocol of Salvador — article 1 — regarding a similar establishment of obligations in the International Covenant on Economic, Social and Cultural Rights, the Committee to supervise compliance of this treaty points out that the Pact — article 2.1 —³⁴ (CESCR) “shall be interpreted based on its general objective, which is to establish clear obligations for participant Governments for rights to be effective”.³⁵

The CESCR declares there are immediate obligations to comply: To guarantee this right with no discrimination; take deliberate, concrete and focused measures, as clear as possible, to comply obligations posed by the treaty and prevent all regressive measures.³⁶ Besides, Governments are “obliged to ensure satisfaction, at least, in the basic levels of each right.”³⁷

In their General Observations — 14 and 15 — on content and scope of other economic, social and environmental rights, specifically on health care and water rights, the Committee recognized the previous as legal and general obligations. Then, it proceeds to analyze specific legal obligations, those that the Committee considers as the root of all human rights: Respect, compliance and protection.³⁸

According to the CESCR, obligation to respect, negatively, demands no abstention, direct or indirect, to this right.³⁹ Obligation to comply must be to positively adopt actions to

³³ Thesis: 1a. CCXXXVI/2013 (10a.), 2004170, Primera Sala, *Weekly Federal Court Report and its Gazette*, Book XXIII, August 2013, Book 1, pag. 736

³⁴ Article 2.1. Each Government member of this Covenant is obliged to adopt legal measures — separately and with support and international collaboration — especially economic and technical on the highest level of available resources to progressively achieve, by all means, under effective rights herein. General Assembly of United Nations. International Covenant on Economic, Social and Cultural Rights (December 16, 1966) *Treaty Series*, vol 9993, p.3.

³⁵ CESCR, General Observation No. 3, Obligations of Member Governments (par. 1 of article 2 of the Covenant), (5th assembly, 1990), U.N. Doc. E/1991/23 (1990), par. 9.

³⁶ *Ibid*

³⁷ *Ibid.*, par. 10

³⁸ See CESCR. General Observation No. 14, op. cit *supra* 4, par. 34; CESCR. General Observation No. 15, op. cit *supra* nota 30, par. 20. CESCR. General Observation No 12, The right to adequate nutrition (art. 11), (20th assembly, 1999), U.N. Doc. E/C.12/1999/5 (1999), par. 15; Henry Shue, *Basic Rights: Subsistence, Affluence and U.S. Foreign Policy* (2nd ed, 1996) 52. Asbjørn Eide, UN Special Rapporteur for the Right to Food, *The Right to Adequate Food as a Human Right: Final Report submitted by Asbjørn Eide*, UN Doc E/CN.4/Sub.2/1987/23 (1987) [67]–[69].

³⁹ See CESCR. General Observation No. 15, op. cit *supra* nota 30, par. 21.

guarantee effective access to this right.⁴⁰ Finally, obligation to protect imposes the duty to prevent others to diminish this right.⁴¹

In conjunction, we declare that the human right to a safe and healthy environment poses the same obligations to Governments. To interpret these obligations related to the right herein studied — and to support the hermeneutic study of the Supreme Court of Justice regarding the constitutional article 4 — decisions of the European Court of Human Rights, the African Commission on Human and Peoples' Rights, and even the common civil law, are very useful.

Though neither the European Covenant on Human Rights nor its protocols include the human right to a safe and healthy environment, in different times the European Court has declared there were violations to the Covenant due to affectations to the environment, such as pollution (in different ways, including auditive pollution), even when it was generated by companies. Besides confirming the interdependancy relation of rights exercise and environmental conditions, these decisions show the scope of obligations derived from the human right to a safe and healthy environment. Historic decisions, such as those from the cases of *López Ostra*, *Guerra and others*, *Öneryildiz* and *Fadeyeva*, serve to inform the Supreme Court of Justice.⁴²

In the historic judgement in the case of *López Ostra vs. Spain* (1994), the European Court of Justice declared there was a violation of the right to a private and family life (art. 8), among others, of Mrs. Gregoria López Ostra from pollution generated by a treatment plant of SACURSA. Though the Government of Spain was not responsible for emissions from the plant, the Court established that the Government had allowed the construction of the plant and there was a high potential that members of the Municipality were aware of the environmental damages.

In *Guerra and others vs. Italia* (1998), the Court declared that Italy had violated article 8 of the Covenant, since it did not take applicable actions to protect the rights of petitioners regarding inflammable gases emitted by a fertilizer plant of EniChem Agricoltura.

The decision of the Court on *Oneryildiz vs Turquía* (2002) is also relevant. It declared there were violations to the Covenant (including the right to life) since it did not adopt applicable actions on the operation risk of the landfill, which did not comply technical standards and exploded in 1993.

In *Fadeyeva vs. Rusia* (2005), though the petitioner could not prove the causal relation of her illness and surgery to operations of a metallurgic plant, the European Court

⁴⁰ Ibid., par. 25.

⁴¹ Ibid., par. 23.

⁴² Other relevant cases are *Zander vs. Suecia* (1993), *Taskin and others vs. Turquía* (2004), *Giacomelli vs. Italia* (2006), all from the European Court on Human Rights.

determined that the petitioner's health was deteriorated as a result of prolonged exposure of emissions and declared there was a violation to the Covenant.

Besides these decisions, we would appreciate the Supreme Court of Justice to focus specially on the decision of the African Commission on Human and Peoples' Rights in the case of *Social and Economic Rights Action Center and Center for Economic and Social Rights vs. Nigeria* (2002). In this case, the African Commission analyzed, applied and declared a violation of article 24 of the Banjul Charter on the right to a satisfactory environment in general. This due to the pollution affecting the Ogoni community, generated by the *Nigerian National Petroleum Company*, which operated in collaboration with *Shell Petroleum Development Corporation*.

In this case, the African Commission declared that "the right to a global adequate environment, such as declared in article 24 of the African Charter or the right to a safe and healthy environment, as widely known, poses clear obligations for the Government".⁴³ "It poses Government to take reasonable measures or actions to prevent pollution and environmental degradation to promote conservation and assure development and sustainable use of natural resources".⁴⁴

These decisions contribute some analysis elements on the scope of obligations derived from the human right to a safe and healthy environment. First, we can consider the right herein implies the negative obligation of the Government to not perform activities involving pollution and degradation of environment damaging people's health, which is within the category of *respect* mentioned before.

Second, it is possible to infer that the human right to a safe and healthy environment comes from the positive obligation of adopting measures to prevent and stop activities causing environmental damage or representing a risk, with potential affectations to human health. That is, it is also a duty of *compliance*.

Finally, we notice the obligation to prevent third parties to diminish the grant of this right. Thus, we agree with those who think that assuring the human right to a safe and healthy environment "involves adopting regulation of particular activities to prevent and control activities representing environmental risks".⁴⁵ In other words, the human right to a safe and healthy environment involves a duty of *protection*.

⁴³ African Commission on Human and Peoples' Rights. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001), par. 52

⁴⁴ Ibid.

⁴⁵ Gabriela Cuadrado Quesada, El reconocimiento del derecho a un medio ambiente sano en el derecho internacional y en Costa Rica [*Recognition of the right to a safe and healthy environment under international law and in Costa Rica*], *Revista CEJIL "Debates sobre Derechos Humanos y el Sistema Interamericano"*. Año IV No 5 (December 2009), p. 3. Available at: <http://www.corteidh.or.cr/tablas/r24270.pdf>.

Then, this *Amicus* seeks to declare that for compliance of obligations is necessary, among others, that the Government adopts preventive and precautionary measures, as explained below. Measures that — in collaboration with the CESC standard — shall be deliberate, concrete and conducted in the most effective compliance of the human right to a safe and healthy environment and preventing any opposite measures. Guaranteeing these obligations from the human right to a safe and healthy environment shall preserve the right of no discrimination.

IX. ADOPTING PREVENTIVE AND PRECAUTIONARY MEASURES FOR COMPLIANCE OF OBLIGATIONS DERIVED FROM THE HUMAN RIGHT TO A SAFE AND HEALTHY ENVIRONMENT

Prevention and precaution are two fundamental principles to guarantee the right to a safe and healthy environment. Indeed, the Government has a general prevention obligation, which the Supreme Court of Justice is aware of, and that was widely developed by the Intern-American court along its jurisdiction. But, environmentally it is possible to claim that a reinforced obligation of prevention is updated — consolidated as one of the fundamentals of the environmental *corpus jursi*⁴⁶ — and legally established in the Act of Ecological Balance and Environment Protection.⁴⁷

According to Alexandre Kiss and Dinah Shelton — pioneers in International Environment Law — “experience and science demonstrate that prevention must be the rule of thumb for environment, regarding ecologic and economic reasons”.⁴⁸ They declare that the primary obligation from this principle is the previous assessment of potentially hazardous activities⁴⁹ and the obligation of “adopting measures for preventing damage, reducing or eliminating the risk of potential environmental damage”.⁵⁰

Doctor Tania García López also declares that “the preventive approach of the environmental right consists in legal standards to establish dispositions to prevent environmental damage, which could be achieved with specific measures for performing activities that may cause some damage, delimiting the use of certain materiales, or demanding the use of certain technology”.⁵¹

⁴⁶ Declaration of Rio (principle 17); Book 21 (chapter 22); Covenant on Biological Diversity (article 14); Convention on the Law of the Sea (article 206); Covenant on Assessment of Environmental Impact in a Transboundary Context (1991); Convention on Transboundary Effects of Industrial Accidents (1992); North America Treaty for Environmental Collaboration (1993); Covenant on Nature Conservation of South Pacific (1976).

⁴⁷ Dispositions of this law, under article 1, have the objective — among others — “VI. Prevention and control of air, water and soil pollution”.

⁴⁸ Alexandre Kiss and Dinah Shelton, op. cit. *supra* nota 31, p. 263.

⁴⁹ Ibid.

⁵⁰ Concept offered by two experts in International Law, Alexandre Kiss and Dinah Shelton in (2000) “International Environmental Law”. United States: Transnational Publishers. Op. cit. *supra* nota 31.

⁵¹ García López, Tania (2013). Derecho Ambiental Mexicano. Introducción y Principios. [Introduction and Principles to Mexican Law on Environment] México: Bosch, pág. 153.

Precaution is the second principle. If there is still a discussion if the precaution principle represents a standard of the common law, there is a general agreement in the international community that it is a principle of international law.⁵² Based on this consideration, it has been applied by some Brazilian courts in cases against the marketing authorization of genetically modified soy.⁵³ In fact, "since 1990 it appears in all international instruments related to environment protection"⁵⁴, including the Protocol of Cartagena on Biotechnology Security (article 1), ratified by Mexico in 2002:

According to the precautionary approach under the Declaration of Rio on Environment and Development — principle 15 — the objective of this Protocol is to contribute for guaranteeing adequate protection to safe transfer, management and use of live modified organisms resulting from modern biotechnology that may adversely affect conservation and sustainable use of biological diversity; considering risks to human health and focusing in transportation between borders.

Like prevention principle, the precautionary principle seeks to prevent environmental damage when lack of action may be severe.⁵⁵ According to the Declaration of Rio — article 15 — "Governments shall fully apply the principle of precaution based on their capabilities". Additionally we find a key element of this principle, "the lack of scientific certainty shall not be used as a reason to delay the adoption of effective measures based on costs to prevent degradation of the environment".⁵⁶

This principle poses the obligation to effectively prevent these risks,⁵⁷ even if there is a lack of scientific certainty on damages that any activity may produce. Only contrary

⁵² For European Community is a principle of the common law or a principle of international law. In countries, such as India or Pakistan, courts have considered it, and applied it, as an international law principle Birnie, Boyle y Redgwell (2009). *International Law & the Environment*. Great Britain: Oxford, p. 162 and 162.

⁵³ Lesley K. McAllister. Judging GMOs: Judicial Application of the Precautionary Principle in Brazil, *Ecology Law Quarterly* Vol. 32, Issue 1 (January 2005): 149-174, p. 158, who also mentions other sources observing the precautionary principle with this effect by courts of Australia, Canada, Holland, Great Britain, United States and Germany.

⁵⁴ Alexandre Kiss and Dinah Shelton, op. cit. *supra* nota 31, p. 264. See Convention of Bamako on Prohibition of Importing Hazardous Wastes to Africa and Control of Transboundary Movements and Management in Africa (1991); Covenant of Helsinki on Protection and Use of Transboundary Watercourses and International Lakes (1992); Framework Covenant of United Nations on Climate Change; Covenant on Biological Diversity (1992); Maastricht Treaty in European Union recognizes it as a basic principle of environmental policy (1992); among other 80 international covenants. See GMOs & the Precautionary Principle (2005), p. 153.

⁵⁵ Alexandre Kiss and Dinah Shelton, op. cit. *supra* nota 31, p. 264

⁵⁶ Declaration of Rio on Environment and Development UN Doc. A/CONF.151/26 (vol. I) / 31 ILM 874 (1992).

⁵⁷ Birnie, Boyle y Redgwell (2009). *International Law & the Environment*. Gran Bretaña: Oxford.

considerations about any activity on the environment within the scientific community would be necessary to consider a scientific uncertainty.⁵⁸

For example, at the end of the 90's the precautionary principle was used by the Supreme Court of India for its decisions on environmental cases. Particularly, it has declared that the "precautionary principle is based in the theory that it is better to lean toward precaution than to prevent environmental damages that may be irreversible. The precautionary principle involves anticipation of environmental damages and adoption of measures to prevent them [...]".⁵⁹

The prevention principle and precaution principle form a partnership setting the permanent obligation of the Government to be extremely cautious in managing, monitoring and surveilling activities that cause or may cause any environmental damage. Prevention principle — and obligation — poses the Government a duty of preventing potential environment damages or risks. Precautionary principle reinforces this obligation, even when there is no scientific certainty of damages. That is, it is not necessary to prove that certain activity will result in a severe or irreversible damage to take preventive measures.⁶⁰

Specific implications of this principle — the content of "the duty of acting" — were not limited in the Declaration of Río. However, some have declared that an expression of the "duty of acting" relies on the Government to prohibit and restrict certain activity or product when there is uncertainty on the potential environment damages; or at least, consider this uncertainty to determine any action or how to proceed.⁶¹ Lesley K. McAllister summarizes some illustrative decisions as follows:

In 1993, the Australian Court applied the principle to postpone the construction of a road until the Government had data about population and habitat of a threatened frog species. In 1994, the Pakistan Supreme Court applied the precautionary principle to cancel the authorization to build an energy plant while there was no scientific evidence about the harmless effect of electromagnetic fields. In 1996, the Supreme Court of India applied the principle as a legal foundation to regulate the implementation of strict

⁵⁸ Ibid., p. 156, quoting *European Communities – Measures affecting meat and meat products (hormones)*. World Trade Organization, Appealing entity (WT/DS26/AB/R y WT/DS48/AB/R), decision of January 16, 1998, par. 194

⁵⁹ Supreme Court of India: A.P. Pollution Control Board vs Prof.M.V.Nayudu (Retd.) & Others (January 27, 1999), available at: <http://indiankanoon.org/doc/764031/>. See Vellore Citizens Welfare Forum vs Union Of India & Ors (August 28, 1996), available at: <http://indiankanoon.org/doc/1934103/>; S. Jagannath vs Union Of India & Ors (December 11, 1996), available at: <http://indiankanoon.org/doc/507684/>. Sites visited on August 3, 2015.

⁶⁰ Birnie, Boyle y Redgwell, op. cit. *supra* nota 56, p. 163.

⁶¹ Lesley K. McAllister op.cit *supra* nota 53, p. 155.

control measures of industrial pollution and closing of facilities not complying this.⁶²

The precautionary principle offers a legal foundation to prohibit and restrict an activity.⁶³ Then, the precautionary principle offers the regulating entity basis to analyze any decision making process to authorize any activity if it considered there is a potential scientific uncertainty of environmental risks.⁶⁴ McAllister states how American Courts have developed the guidelines of "hard look", involving a detailed and strict analysis to prevent Government decisions made with excessive discretion, omitting the introduction of risk factors and scientific uncertainty in this process, negatively impacting the environment.⁶⁵

Controlling the Government decisions, Courts perform a strict assesment of internal process for this decision making⁶⁶ to reduce potential arbitrary decisions and to effectively supervise Government entities to identify and evaluate areas where there is still scientific uncertainty.⁶⁷

X. CONCLUSION

Knowing the essential relation between the right to a safe and healthy environment and guaranteeing other human rights, at this early international stage of development, we highlight the great opportunity of the Supreme Court of Justice to contribute in the content interpretation and the scope of this right.

In fact, interpreting and applying article 4, parragraoh 5, of the Constitution in the Reviewed Writs of Amparo herein mentioned — through a hermeneutic exercise favoring the best protection of the perso, under article 1, and according to international standards — the Supreme Court of Justie shall be providing relevant analysis elements to the international discussion on this topic, besides protecting the rights of the affected peoples.

Additionally, the control of the Supreme Court of Justice may exercise, applying the prevention and precautionary principles, will be significant to move toward the protection of the human right to a safe and healthy environment; benefiting not only the

⁶² Ibid. p. 159.

⁶³ Ibid., p. 157, quoting David Vogel, *The Hare and the Tortoise Revisited: The New Politics of Consumer and Environmental Regulation in Europe*, 33 BRIT. J. POL. SCI. 557, 561-62 (2003); Trouwborst, *supra* note 14, at 189-200; Daniel Bodansky, *The Precautionary Principle in US Environmental Law*, in INTERPRETING THE PRECAUTIONARY PRINCIPLE (Timothy O'Riordan & James Cameron eds., 1994).

⁶⁴ Lesley K. McAllister op.cit *supra* nota 53, p. 170.

⁶⁵ Ibid., p. 169.

⁶⁶ Lesley K. McAllister citando a Harold Leventhal, *Environmental Decisionmaking and the Role of the Courts*, 122 U. PA. L. REV. 509, 512-13 (1974); Cass R. Sunstein, *Deregulation and the Hard-Look Doctrine*, 1983 SuP. CT. REV. 177, 181 (1983), p. 169.

⁶⁷ Ibid., p. 173.

environment but the people affected by its degradation, and effectively granting this right for future generations.

XI. PETITION

Therefore, we request the Supreme Court of Justice to receive this document as an *Amicus Curiae* and to consider the analysis elements discussed in this document when solving the Writs of Amparo herein.

Mexico, D.F. August 18, 2015
SINCERELY

"THE TRUTH WILL SET US FREE"

Denise González Núñez, M.St.
HUMAN RIGHTS PROGRAM
COORDINATOR

Mtra. Dulce María Ramos M.
ENVIRONMENT PROGRAM
COORDINATOR

UNIVERSIDAD IBEROAMERICANA, MEXICO CITY
Prolongación Paseo de Reforma 880, Lomas de Santa Fe, México, C.P. 01219, D.F.